Supreme Court, U.S.
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No. 92-310

In The

Supreme Court of the United States

October Term, 1992

SHIRLEY O'QUINN,

Petitioner,

v.

WEDCO TECHNOLOGY, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Wedco Technology, Inc.,[1] respectfully requests that this Court deny a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals For the Tenth Circuit.

JURISDICTION

Jurisdiction of this Court is sought by Petitioner under 28 U.S.C. § 1254(1) (Supp. 1992). S. Ct. R. 13.1

[1] Pursuant to S. Ct. R. 29.1, Wedco Technology, Inc., states it has no parent companies or subsidiaries, other than wholly-owned subsidiaries.

provides that petition for a writ of certiorari to review a judgment in any case shall be deemed timely when filed within ninety (90) days after entry of the judgment. Petitioner's claims were dismissed by the district court on December 21, 1990. A motion to alter or amend judgment was filed December 31, 1990, and denied April 1, 1991. Petitioner filed a notice of appeal on April 29, 1992. On February 11, 1992, the United States Court of Appeals affirmed the district court's judgment in favor of defendant. On February 24, 1992, a Petition For Rehearing and Suggestion For en banc Consideration was filed with the Tenth Circuit which was denied on May 11, 1992.

Federal Rules of Appellate Procedure for the United States Court of Appeals, Rule 35(c) provides that a suggestion for rehearing en banc does not affect the finality of the judgment of the Court of Appeals or stay the issuance of a mandate. Further, S. Ct. R. 13.4 provides that a suggestion for rehearing en banc, pursuant to Rule 35(b), Fed. R. App. P. 35(b), is not a petition for rehearing within the meaning of S. Ct. R. 13.4. This petition was not filed until August 7, 1992, and was docketed on August 17, 1992. Therefore, this petition is not timely pursuant to S. Ct. R. 13.

STATEMENT OF THE CASE

On May 18, 1985, Shirley O'Quinn, the Petitioner, injured her hand while operating two machines at the place of her employment, Texas Instruments in Colorado Springs, Colorado. She first reported her injuries and any alleged cause of her injuries to her employer on May 18,

1985. Petitioner alleges she was operating two machines, a machine lathe and bar feed device. The lathe was allegedly manufactured by Wadell Equipment Company, a defunct corporation alleged to be a predecessor in interest of Wedco. The bar feed was manufactured by Powerhold, Inc., an unrelated Connecticut corporation. Petitioner was injured while operating the Powerhold bar feed, which was not designed, constructed, nor assembled by Wadell Equipment Company.

It is undisputed that the applicable statute of limitations expired on May 18, 1988. Petitioner commenced this action, 23 days before the limitations period ran, by filing a Complaint on April 25, 1988 naming "Doe Manufacturing Company, a/k/a Wadell Company," asserting claims for breach of warranty, strict liability, and negligence. No claim was asserted against Powerhold by Petitioner.

On May 16, 1988, an Amended Complaint was filed, naming Wadell Equipment Manufacturing, Inc., as the only Defendant. Not until September 23, 1988, over four months after the expiration of the limitations period, did Petitioner file and serve a Second Amended Complaint incorrectly naming Wadell Machine & Tool, Inc. (Wadell Machine) as successor in interest to Wadell Equipment Company.[2] The Complaint was served upon Laszlo Rendas, as registered agent for Wadell Machine. On September 23, 1988, through Laszlo Rendas, Wedco received

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[2] Inconsistent with Petitioner's implied difficulty in locating "Wadell," Wadell Machine & Tool, Inc., which purchased certain assets from Wadell Equipment Company, was incorporated and registered as doing business in New Jersey since October, 1987.

its first notice of Plaintiff's claims. Wadell Machine filed a timely answer denying it was a successor to Wadell Equipment Company. A Third Amended Complaint was filed in May, 1989, in which Petitioner's Workers' Compensation carrier, Fidelity & Casualty Company, joined as a co-plaintiff. The El Paso County, Colorado District Court dismissed Wadell Machine on April 11, 1990, since it was not the manufacturer, nor was it the successor in interest to the manufacturer of the machine lathe. On June 4, 1990, over 23 months after Petitioner was on notice that Wadell Machine was not the manufacturer of the machine lathe, and over two years after the statute of limitations had expired, a Fourth Amended Complaint was filed naming Wedco as the sole defendant.

The action was properly removed and the United States District Court For The District of Colorado accepted jurisdiction based on diversity. Applying this Court's decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986), the District Court found: "[It] is uncontested that if the federal rules apply, under *Schiavone*, Wedco was not timely informed, the Fourth Amended Complaint cannot relate back, and the action is time barred." (Petitioner's Appendix 7a.)

The District Court indicated that even accepting Petitioner's position, applying Colorado Rule of Civil Procedure 15(c): "I conclude that if the Colorado Supreme Court considered the question today, the court again would follow the applicable federal rule. That rule now is expressed by *Schiavone*, not *Ingram*." (Petitioner's Appendix 8a.)

The District Court dismissed Petitioner's claims, applying Fed. R. Civ. P. 15(c). The District Court held Petitioner's Fourth Amended Complaint did not relate back and the claims were therefore barred by the statute of limitations; and even applying C.R.C.P. 15(c), as suggested by Petitioner, the same result is reached.

With respect to Petitioners argument that C.R.C.P. Rule 15(c) rather than the Federal Rule applies to a removal action, the District Court specifically pointed out: "Most courts that have considered this question, including this court, have concluded that this is a question of federal procedure." (Petitioners Appendix 9a.)

Significantly, the District Court foreshadowed the subsequent 1991 amendment to Fed. R. Civ. P. 15(c) in holding:

> Without deciding how long a reasonable time for service of process is under *Dillingham* [construing C.R.C.P. 15(c) as including a reasonable time for service] I conclude that more than four months is beyond a reasonable time. Therefore, applying *Dillingham*, the Fourth Amended Complaint cannot relate back to the previous complaints.

(Petitioner's Appendix 9a.)

Plaintiff's motion to alter or amend the judgment of the District Court was denied on April 1, 1991. (Petitioner's Appendix 10a.) Petitioner filed a Notice of Appeal to the United States Court of Appeals For The Tenth Circuit on April 29, 1991. A three-member panel of the Tenth Circuit affirmed the District Court's judgment

on February 11, 1992. Petitioner's suggestion for rehearing en banc was denied on May 11, 1992.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

A. THERE IS NO CONFLICT OF DECISIONS.

There is currently no conflict between this case and any decision of this Court or any Court of Appeals. Petitioner contends certiorari should be granted to "clear up conflicting decisions between the Colorado Supreme Court, the Tenth Circuit, and this Court." Petitioner's contention is unfounded. The Colorado Supreme Court decision upon which Petitioner relies is not in conflict with the Tenth Circuit decision since the state decision predates *Schiavone* and applies a state rule of civil procedure, whereas the Tenth Circuit decision was based on application of a federal rule of civil procedure.

B. THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION.

Petitioner's assertion that this case presents a constitutional question of importance is erroneous. The Petition centers around application and interpretation of a state rule of civil procedure. Further, this Court has recently considered the question presented concerning relation back of amended proceedings pursuant to Fed. R. Civ. P. 15(c). *See Schiavone v. Fortune*, 471 U.S. 21 (1986). Whether construed under Fed. R. Civ. P. 15(c) in effect at the time of the district court's judgment, or under amended Fed.

R. Civ. P. 15(c) which incorporates Petitioner's concerns, Petitioner's claims were properly dismissed.

C. THE DISTRICT COURT CORRECTLY APPLIED Fed. R. Civ. P. 15(c) IN DISMISSING PETITIONER'S CLAIMS.

The petition asks this Court to find that Colorado Rule of Civil Procedure 15(c) applies to a diversity case, and that the Colorado Supreme Court would diverge from this Court's interpretation of the identically worded federal rule and subsequent amendments to the Federal Rule. Contrary to Petitioner's contentions, the district court correctly applied Fed. R. Civ. P. 15(c) as required by *Hanna v. Plumer*, 380 U.S. 460 (1964), and as interpreted by this Court in *Schiavone v. Fortune*, 477 U.S. 21 (1986). Fed. R. Civ. P. 15(c) covers the situation presented and must be applied unless the Rule exceeds the terms of the Enabling Act or Constitutional restrictions. In any event, Petitioner's concerns have been addressed by new Fed. R. Civ. P. 15(c), which now provides that the period in which a defendant must have notice of the claim for it to relate back includes the period for service provided by Rule 4, 120 days. Even applying amended Fed. R. Civ. P. 15(c), Petitioner's claims were properly dismissed. Lastly, as the District Court indicated, even applying state Rule 15(c), in light of *Schiavone*, Petitioner's claims were properly dismissed.

ARGUMENT

Petitioner asks this Court to find that, despite a federal rule which clearly encompasses this issue, the Colorado Rules of Civil Procedure should govern.

However, this Court has long held that where there is a conflict between a federal rule of civil procedure and a corresponding state rule on procedural matters, the federal rule applies. *Hanna v. Plumer*, 380 U.S. 460 (1964).

> When a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the Enabling Act nor constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, at 471 (1964). This Court confirmed adherence to this analysis in *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987). It is suggested that the constitutional authority of Congress to enact Fed. R. Civ. P. 15(c) is not seriously questioned. Therefore, based upon *Hanna*, the validity of Fed. R. Civ. P. 15(c) under the Rules Enabling Act, 28 U.S.C. § 2072, is presumed and the federal rules prevail over contrary state practice.

In *Schiavone v. Fortune*, 477 U.S. 21 (1986), this Court considered the very issue presented in this case. Under *Schiavone*, the newly added defendant must have notice of the claims within the limitations period before an amended complaint adding him as a defendant will relate back. Applying *Schiavone*, the district court held: "Under *Schiavone*, Wedco was not timely informed, the Fourth

Amended Complaint cannot relate back, and the action is time barred." (Petitioner's Appendix 7a).

Petitioner's reliance upon *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), is misplaced. *Walker* involved a dispute over the application of the appropriate statute of limitations to a personal injury suit. Walker timely filed his complaint in the Oklahoma District Court, but did not serve Armco until four months later. The Oklahoma statute of limitations required service within 60 days of filing. Walker argued that under Fed. R. Civ. P. 3, his action was commenced at filing, tolling the limitations period. This Court reversed, finding that both Fed. R. Civ. P. 3 and the Oklahoma statute could exist side-by-side without conflict, and, therefore, the *Hanna* analysis did not apply. *Walker v. Armco Steel Corp.*, 446 U.S. at 752. This Court has recast the *Hanna* analysis so as not to require even a direct conflict, but to require application of the procedural rule whenever a federal rule "covers the point in dispute." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). Moreover, the *Walker* decision points out that Rule 3, rather than the state statute concerning service, governs in a diversity action. The federal rules provide various timing requirements, though not replacing the requirements of the state limitations period. *Walker v. Armco*, 446 U.S. at 751, 752.

Here, the *Hanna* decision is determinative of the question presented.

> Thus, a court, in measuring a federal rule against the standards contained in the Enabling Act and the Constitution, need not blind itself to the degree to which the rule makes the character and the result of the federal litigation stray from

> the course it would follow in state courts. . . . To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

Hanna v. Plumer, 380 U.S. at 473. The District Court properly dismissed Petitioner's claims in applying Fed. R. Civ. P. 15(c).

Further, Fed. R. Civ. P. 81(c) relied upon by Petitioner does not support her position. Rule 81(c) requires application of the Federal Rules of Civil Procedure in a removal case, rather than state rules.[3] Although Petitioner correctly points out that the federal rules do not apply prior to removal, this Court has previously acknowledged the propriety of applying federal rules following removal, despite differences in state court practice.

> The petitioner having removed his case into the Circuit Court has a right to have it further progress governed by the law of the latter Court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed.

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[3] *See* 28 U.S.C. § 81 (Supp. 1992); *Freeman v. Bee Machine Co.*, 319 U.S. 448, 452 (1943) (holding that authority to permit amendments to complaint is governed by federal not state law); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423 (1974).

Ex parte Fisk, 113 U.S. 713 (1885). Obviously, when a Federal Court applies the federal rules to regulate the form and conduct of diversity proceedings, a system is employed which may differ from state proceedings. Because the procedures differ, so may the outcome. However, outcome determination has never been an Enabling Act gauge. *Hanna v. Plumer*, 380 U.S. 460, 473 (1965). As noted by the district court dismissing Petitioner's claims, the widely held and correct view is that the issue of relation back is governed by Fed. R. Civ. P. 15(c). (Petitioners Appendix 9a.) *See In re Asbestos School Litigation*, 768 F. Supp. 146 (E.D. Pa. 1991). Other federal courts have taken the same approach.

Smith v. Navistar International Transportation Corp., 737 F. Supp. 1446 (D. Md. 1988), involved a diversity action which had been removed from a Maryland state court. The plaintiff brought product liability claims against Navistar and Bostrum Seating more than three years after the incident occurred. The defendants had no notice of such claim until served two days after the limitations period had expired. Bostrum Seating, like Wadell in the case at bar, was not incorporated at the time of manufacture, and like Wadell was dismissed since it could not be held liable as a successor corporation. Smith filed an amended complaint to add Bostrum, a predecessor to Bostrum Seating, eighteen months after the limitations period had expired. The Court found such facts squarely within the *Schiavone* decision, and applying Fed. R. Civ. P. 15(c), held the claims were time barred.

Similarly, in *Simmons v. South Central Sky Workers Ins.*, 936 F.2d 268 (6th Cir. 1991), the Sixth Circuit considered whether plaintiff's amended complaint in a diversity

action was time barred pursuant to Federal Rule 15(c), or was timely pursuant to Kentucky state law. The court held that the relation back issue is a question of federal law, citing *American Bankers Ins. Co. of Florida. v. Colorado Flying Academy, Inc.*, 93 F.R.D. 135 (D. Colo. 1982). The Eighth Circuit has held similarly, finding that regardless of whether Fed. R. Civ. P. 15(c) conflicts with the state rule, the federal rule applies. *Brown v. E. W. Bliss Co.*, 818 F.2d 1405 (8th Cir. 1987).

Petitioner fails to address the authority presented above. Instead, Petitioner points to unrelated authority, most of which predate *Schiavone*. The decision in *Headrick v. Atchison T. & S.F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950), does not support Petitioner's position. *Headrick* involved a personal injury action filed in a New Mexico state court, which was removed on diversity grounds. Neither Fed. R. Civ. P. 81(c) nor Fed. R. Civ. P. 15(c) were at issue. The only issue presented was the choice of state limitations periods applicable when a removal case is transferred from federal court in New Mexico to federal court in California.

Anderson v. Allstate Insurance Co., 630 F.2d 677 (9th Cir. 1980), also does not support Petitioner's position. In fact, in *Anderson* the court held that plaintiff's amended complaint adding a new defendant did not relate back to the original timely filing and, therefore, plaintiff's claims were dismissed as being time barred. The sole reason for partial reversal of the *Anderson* district court order dismissing plaintiff's complaint was that plaintiff's tortious interference with business relations claim was found to be controlled by a longer statute of limitations, making

the amended complaint timely, and Fed. R. Civ. P. 15(c) a non-issue.

Nealy v. Transportacion Maritima Mexicana S.A., 662 F.2d 1275 (9th Cir. 1980), a pre-*Schiavone*, decision, also fails to support Petitioner's position since it involved neither Fed. R. Civ. P. 15(c) nor a relation back issue. In fact, it was undisputed that Nealy's action was brought within the applicable California statute of limitations, and the only issue on appeal was the court's dismissal of the action pursuant to Fed. R. Civ. P. 41(b), for failure to prosecute.

Significantly, Petitioner refers in passing to a subsequent amendment to Fed. R. Civ. P. 15(c). In 1991, Fed. R. Civ. P. 15(c) was amended. The advisory committee notes indicate the amendment was in direct response to this court's decision in *Schiavone*. Fed. R. Civ. P. 15(c) advisory committee's note. The rule was amended April 30, 1991, with an effective date of December 1, 1991. The District Court properly applied the previous rule to this action, in which the District Court accepted jurisdiction in June, 1990. Modification of the Federal Rule is not appropriately addressed by a grant of *certiorari*, but in any event, Petitioner's concerns have been addressed and codified in Fed. R. Civ. P. 15(c) as amended, which now provides that the period within which a defendant must have notice of the claim for it to relate back includes the period for service provided by Rule 4, 120 days. Fed. R. Civ. P. 15(c)(3). Wedco did not receive notice of Petitioner's claims within 120 days. Therefore, even applying Fed. R. Civ. P. 15(c) as amended, which fully addresses any arguable harshness under the *Schiavone* decision, Petitioner's claims were properly dismissed.

Petitioner contends, without support, that 15(c) of the Colorado Rules of Civil Procedure applies and that the Colorado Supreme Court is unlikely to reverse its *Dillingham* holding. However, *Dillingham v. Greeley Publishing Company*, 701 P.2d 27 (Colo. 1985), pre-dates this Court's contrary holding in *Schiavone v. Fortune*, as well as the 1991 amendment to Fed. R. Civ. P. 15(c). The Colorado Supreme Court in *Dillingham* pointed out that the Colorado Rules of Civil Procedure were patterned after the Federal Rules and the District Court determined as follows: "I conclude that if the Colorado Supreme Court considered the question today, the court again would follow the applicable Federal Rule. That rule is now addressed by *Schiavone* . . . " (Petitioner's Appendix 8a.)

Since the District Court's determination as to the law of the state in which it sits must be given deference, Petitioner's claims were properly held to be time barred. This remains true whether application of the rule is made pursuant to *Schiavone*, or under Fed. R. Civ. P. 15(c), as amended.

CONCLUSION

Pursuant to this Court's decision in *Schiavone*, Petitioner's claims were properly dismissed. Moreover, dismissal was appropriate whether the Court applied Fed. R. Civ. P. 15(c) as interpreted by *Schiavone*, or Rule 15(c) as amended in response to *Schiavone*.

Petitioner attempts to create an issue concerning forum shopping. That federal courts may be closed to

litigation where state courts are open is no novel proposition. In fact, the complete diversity rule and the requisite amount in controversy requirement presuppose such a situation. In addition, the fact that relation back is tied to the statute of limitations only serves to emphasize the appropriateness of the *Hanna* analysis. To the extent Fed. R. Civ. P. 15(c) prohibits federal court adjudication, it serves to make dockets less crowded and evidence fresher. The greater the procedural effect, the stronger the claim that the relevant rule fulfills the purpose described in the Rules Enabling Act. *Hanna* established that the presumption of validity accorded the Federal Rules can be rebutted only if the rule exceeds the bounds of the Constitution or if substantive rights are abridged in violation of the Enabling Act. Further, *Hanna* seeks to put to rest the threat to the uniformity and independence of the federal rules from state procedure. By her petition, Shirley O'Quinn seeks to have this Court replace the federal rules with a mosaic of state procedures. The need for uniformity is too important a goal to begin sliding down such a slippery path.

Respectfully submitted,

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